

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TONY D. PENWELL,) CASE NO. C05-2106-TSZ-MAT
Plaintiff,)
v.) ORDER
REED HOLTGEERTS, *et al.*,)
Defendants.)

Plaintiff Tony D. Penwell's *in forma pauperis* ("IFP") application and his statement justifying appointment of counsel became part of the official record in this matter minutes after the Court issued its order denying appointment of counsel and setting a briefing schedule for the remaining issue. (Dkts. 121, 122, 123.) Although plaintiff's papers arrived ten days after the relevant deadline, he placed them in the mail before the deadline. The Court therefore considers plaintiff's papers but finds that they do not alter the Court's decision to deny appointment of counsel because plaintiff has shown neither indigence nor exceptional circumstances.

Plaintiff's IFP application (Dkt. 122) demonstrates that he is not indigent because he has sufficient funds to pursue this matter without court-appointed counsel. Plaintiff tacitly admits

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01 this fact by noting that although he has sufficient funds in his account, he is using those funds to
02 hire an attorney to file a habeas petition on his behalf. (Dkt. 123, at 1.) Furthermore, even if
03 plaintiff was indigent, the court would not exercise its discretion to appoint counsel because
04 plaintiff has shown no exceptional circumstances to justify it. As the Court mentioned in its
05 prior order, the Ninth Circuit has simply and narrowly defined the sole issue that remains
06 pending. The record suggests neither a likelihood of success on the remaining issue nor a level
07 of complexity that would justify court-appointed counsel. In response to plaintiff's concern
08 about his own health, the Court notes that it will entertain any reasonable motions for
09 extensions of time to file his initial brief or to file his reply brief.

10 Having considered plaintiff's papers, the Court reaffirms its **DENIAL** of plaintiff's
11 motion for appointment of counsel. Plaintiff's brief on the remaining issue is due on or before
12 **January 27, 2011**, and is to be noted for consideration no earlier than the fourth Friday after
13 filing and service of plaintiff's brief; defendants' response and plaintiff's reply are due in
14 accordance with **Local Rule CR 7(d)(3)**. The Court directs the Clerk to provide a copy of this
15 Order to plaintiff and to the Honorable Thomas S. Zilly.

16 DATED this 26th day of October, 2010.

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21 Mary Alice Theiler
22 United States Magistrate Judge